NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Thursday, April 27, 1995

(R-2065)
202/273-1991

BASEBALL AND THE "SULTAN OF SWAT" A CONFERENCE COMMEMORATING THE 100TH BIRTHDAY OF BABE RUTH

"THE CURSE OF THE BAMBINO"

Delivered by:

William B. Gould IV
Chairman
National Labor Relations Board
Charles A. Beardsley Professor of Law
Stanford Law School (On Leave)

April 27, 1995
Hofstra University
Hempstead, New York

Issuing the injunction before opening day is important to insure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB's inability to take effective steps against its perpetuation.

Opinion of Judge Sonya Sotomayor,
Southern District of New York in Silverman v. Major League Baseball Players Relations Committee, Inc., April 3, 1995.

Like the Constitution, the Flag, and "straight ahead" jazz, baseball, to paraphrase President Clinton, is the "glue" which holds the Nation together. Combining the analytical and cerebral with the country's passion for that which is romantic, it is one of life's eternal verities in which the clock stands still forever, transcending all periods of one's life -- a game in which there is no buzzer or horn in the form of an arbitrary or predestined time limitation. Like life itself, it gives one the sense and hope that it could go on forever, but in reality, meanders through streams and corners which defy all earthly predictions.

The "Babe" made the dramatic home run central to this game and the expressions associated with the "roundtripper" as well as the game's other aspects have permeated the entire English language, at least on this side of the Atlantic. And it is certainly appropriate in a paper which addresses the "curse of the Bambino" to note that this tradition of grand majestic long drives has lived on in Red Sox lore over the years, first with Jimmy Foxx -- and then, in my memory, in the '40s, '70s and early '80s in the form of Williams, Stephens, York, Doerr, Yaz, Tony C., Rice, Lynn, Scott, Evans and so many others. Canseco, Vaughn and Whiten carry on this great tradition in the new shining season of 1995 which burst forth this week, like spring itself, full of promise, hope and fantasy.

On March 31, the day of Judge Sotomayor's oral bench opinion in the baseball case in which the National Labor Relations Board successfully sought an injunction against alleged owner unfair labor practices, she said:

> The often leisurely game of baseball is filled with many small moments which catch a fan's breath. There is, for example, that wonderful second when you see an outfielder backpedaling and jumping up to the wall, and time stops for an instant as he jumps up and you finally figure out whether it is a home run, a double or a single off the wall, or an out.

More than a quarter of a century before the 1995 baseball case, on a typically warm, humid night in D.C. (later RFK) Stadium, Dick Ellsworth was on

the hill for the Red Sox against the hometown Washington Senators, and was tiring in the late innings. But, Dick Williams, the Bosox manager from '67 through '69, had no one in the bullpen to relieve Ellsworth and, thus stayed with him as Hank Allen stepped in at the plate with the Senators trailing by two with two-on and two-out in the bottom of the ninth. Allen hit a long shot to deep left center which Reggie Smith, the then Sox center fielder, tracked down and raced to the wall for -- and leaped high against the fence.

As he descended to the center field grass, there was that precious moment of which Judge Sotomayor spoke. But in this case, if the ball was over the fence the Senators had won by one run on what the Japanese call a sayonara home run -- and if it was caught , the game was over with the Red Sox the victors.

Only when the Sox bullpen erupted racing down the left field line and onto the field to greet Smith, as he held the ball high, was the result apparent. This was that breathless inescapable moment . . . .

And on a brisk Oakland, California evening 20 years later a ground ball is hit into the hole between short and third for which Alfredo Griffin ranges far to his right. Griffin turns, as if to throw to first base and the runner from second base advances off the bag, anticipating an effortless capture of the third sack on the throw to first -- and in mid-air, with the skill of a ballet dancer, Griffin gracefully twirls and throws to second, eliminating the lead runner from the base paths.

No game is more basic to America's essence than that of baseball. Its elegance and dignity, the big sweep of Burt Blyleven's breaking curve, the heavens opening to the soaring deep fly ball into the distant horizon, as well as the major league pop up which disappears into the stream of brilliant sunshine and the virtuosity of the double play or "twin killing." And no player is more associated with it than Babe Ruth, the Bambino.

As a young boy, listening to the radio during the 1946 season I heard Ted Williams strike out with the bases loaded -- and my father was able to console me with this comment: "It has happened to the Babe also." And Ruth himself said:

> I swing big, with everything I've got. I hit big or I miss big. I like to live as big as I can.

The Babe's early years were in Baltimore where Cal Ripken and Peter Angelos now hold forth. But his major league professional baseball career began with the Red Sox -- as a pitcher, who eventually hit 29 homers when switched to the outfield in 1919. And a very fine pitcher he was -- particularly in the 1916 and '18 World Series which culminated in the Red Sox last World Championships

ever. His ERA's in those two post-seasons of play were 0.64 and 1.06 respectively. In those two Series he pitched 29 2/3 consecutive scoreless innings, a record that was not broken for 43 years!

The sale of Babe Ruth to the Yankees from the Red Sox in 1919 to finance owner H. Harrison Frazee's Broadway ventures, does seem to have placed the "Curse of the Bambino" upon the Red Sox.[1] No world championship has been won by the Townies since then, the ultimate goal having been tantalizingly just missed in the seventh game of the '46, '67, '75 and '86 World Series and in countless other playoffs and tense pennant drives decided on the last day -- or, as in 1972, the penultimate day of the season.

I followed every last step of those tense come-from-behind pennant races in '48 and '49 when the Sox, having come back from an enormous deficit, in both seasons, lost the pennant on the last day -- in '48 on a play-off date itself, only to be repeated in '78 when, this time around, a double digit lead had been squandered against the Yankees.

Like Ruth's $125,000 sale itself, those just missed championships remind us not only of Luis Aparicio falling to the ground as he rounded third base in '72, but also the '46 and '49 groundouts of Tom McBride and Tom Wright -- and even more important, the deficiencies of the Supreme Court's ruling in 1922 in Federal Baseball[2] when Justice Holmes, on one of those bad days that all great baseball players have, concluded that baseball was not a business in interstate commerce within the meaning of the Sherman Antitrust Act. But, of course baseball has always been a business -- as the National Labor Relations Board recognized when it took jurisdiction over this sport in 1969.[3]

Accordingly, Denny Galehouse would not have been on the mound for the Red Sox in the 1948 play-off game if the St. Louis Browns, like the infinitely more successful 1995 Montreal Expos, had not decided to send their players to big market teams for cash and minor leaguers. Mike Torrez would not have been on the hill in that fateful '78 play-off game in which Bucky Dent homered, had not Andy Messersmith and Dave McNally prevailed in the arbitration case which made

---

[1] This theme has been eloquently chronicled in D. Shaughnessy, *The Curse of the Bambino*, (1990). I have found this work to be an informative one, although some of the connections between Ruth and the Red Sox performances in recent years are a bit overdrawn.

[2] Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

[3] The American League of Professional Baseball Clubs, 180 NLRB 190, 191 (1969).

them free agents and produced the first of a series of collective bargaining agreements allowing major league players to exercise a measure of free agency.

And had not Carlton Fisk, the hero of the sixth World Series game in 1975 by virtue of the extra inning home run that he figuratively willed fair, been able to become a free agent as the result of the Red Sox failure to tender an offer under the '76 collective agreement, he, rather than Rich Gedman, might have been behind the plate in that nightmarish after midnight (by daylight saving time) final inning of the 1986 sixth game and would have then gloved Bob Stanley's inside wild pitch which produced the tying run -- and thus would have made Bill Buckner's infamous error anticlimactic.

Nothing has more directly affected baseball's on-the-field developments than the legal developments off-the-field. The 1975 Messersmith arbitration decision of Peter Seitz, alongside of the salary arbitration provisions first negotiated in 1973, provided the Players Association with a surrogate for antitrust law which Federal Baseball and its progeny had earlier denied them.[4] This is the first of a number of ironies affecting baseball and modern employment and labor law.

The second lies in the fact that Federal Baseball was never followed by the courts in other major league professional sports such as football, basketball and hockey. These decisions were influential in establishing unions in these sports because the owners could not avail themselves of the non-statutory labor exemption to antitrust law without a collective bargaining agreement and the players could leverage this liability against them. Accordingly, the antitrust decisions initially gave great impetus to unions and an obligation to recognize and bargain collective bargaining agreements because, in the absence of such agreements, which could provide them with a non-statutory labor exemption, the owners would be liable for antitrust violations for unreasonable restrictions upon player mobility in the form of reserve clauses, draft procedures and the like. By virtue of Federal Baseball, and the Supreme Court's affirmance of it in both the Toolson[5] and Curt Flood[6] decisions, baseball players did not have the same advantage.

But the second phase of the antitrust decisions dealing with the non-statutory labor exemption has produced a more profound irony. For in at least two circuit courts of appeals -- the District of Columbia and the Second Circuit -- the courts have said that owners may avail themselves of the labor exemption

---

[4] Professional Baseball Clubs v. Major League Baseball Players Association, 66 Lab. Arb. (BNA) 101 (1975) (Seitz, Arb.).

[5] Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

[6] Flood v. Kuhn, 407 U.S. 258 (1971).

after having negotiated an agreement, even when unsuccessful in negotiating a subsequent agreement -- unless the employment relationship becomes non-union altogether. The result of this is that, as Judge Wald properly noted while dissenting in the recent Brown v. Pro Football, Inc.[7] case, the non-statutory labor exemption becomes available only under "bizarre" circumstances i.e., where the union pretends to eliminate itself altogether as the National Football League Players Association did in the wake of the 1987 strike -- and as the National Basketball Players Association threatened to do -- and then uses the antitrust laws as a vehicle to revive itself for the purpose of negotiating a new agreement and the consequent labor exemption.

The other major result of both Brown and National Basketball Association v. Williams,[8] decided here in the Second Circuit, is that any kind of balance between the properly competing policies of labor and antitrust laws is eliminated altogether. Thus in football, basketball and presumably hockey, antitrust law and its treble damages remedy is relegated exclusively to the non-union sector, thereby creating an incentive for the players in the major professional sports to be non-union and for employers to foster unionized relationships regardless of their bona fide origin or status -- a result which is hardly compatible with the promotion of freedom of association, collective bargaining and autonomous labor-management relationships -- goals all enshrined in the National Labor Relations Act.

In my judgment the new approach to the non-statutory labor exemption is flawed in another major respect as well. It misconceives the role of National Labor Relations Act. National labor law does not provide for balance, parity, or equality of power,[9] as the D.C. Circuit said.[10] Illustrative of this point is the rule which establishes the lawfulness of permanent economic replacements of strikers engaged in protected activity of the Act.[11] Notwithstanding the Court's

---

[7] Brown v. Pro Football, Inc., ___ F.3d ___, 148 LRRM (BNA) 2769 (D.C. Cir. March 21, 1995).

[8] National Basketball Association v. Williams, 45 F.3d 684 (2d Cir. 1995).

[9] In Brown, the court stated that under federal labor policy, there prevails "a delicate balance of countervailing power," which "favors neither party to the collective bargaining process, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power." Brown, 148 LRRM (BNA) 2769, 2776.

[10] First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); American Ship Building v. NLRB, 380 U.S. 300 (1965).

[11] NLRB v. Mackay, 304 U.S. 333 (1938). President Clinton recognized that the balance of economic power is tipped heavily in favor or employers under this rule, leading him to issue an Executive Order banning the Federal Government from contracting with companies that hire permanent replacements during

comment in American Ship Building to the effect that the strike and lockout are "correlative," the economic weaponry provided the parties is not equal and, most important, the statute, as interpreted, does not contemplate such equality.

This then is the current backdrop to any discussion about the appropriate relevance of antitrust and labor law to the business of baseball. The Supreme Court, of course, can change both Brown and Williams and limit the labor exemption to either the point of impasse in the bargaining relationship or, as I have advocated in a book and a couple of articles published during the past fifteen years, at some point subsequent to impasse -- perhaps a reasonable period of time transpiring in its wake.[12]

The difficulty with either approach, as Justice Harlan remarked in his separate opinion in the Borg Warner[13] decision about some of the rules relating to impasse, is that it is inherently vague -- a point noted by the Court of Appeals in Brown. But this limitation is infinitely preferable to the untoward policy consequences involved in eliminating antitrust law from basketball and football as the Courts of Appeals in the District of Columbia and New York have done.

Congress, should it apply antitrust law to baseball -- and there is no earthly reason why the same standards should not apply to baseball as other major professional sports -- would have to address the labor exemption issue and establish some kind of demarcation line for availability of the exemption and a balance between it and the good faith bargaining objectives contained in the National Labor Relations Act.

Whatever the outcome of the antitrust debate, it is clear that labor law has been extremely relevant to the 1994-1995 strike. The difficulty with the National Labor Relations Act -- and this has made the unions in professional sports all the more interested in using antitrust law -- is its ineffective remedies and poor

---

strikes. Executive Order 12954, 60 Fed. Reg. 13023 (March 8, 1995). I have often addressed this troublesome issue myself, most recently in a speech which I gave before the Bar Association of San Francisco on February 25, 1995. See 38 DLR (BNA) A8, Feb. 27, 1995. Of course, in the recently concluded 1994-1995 baseball strike, the owners hired temporary replacements for the striking ballplayers during the spring training exhibition season and have now hired temporary replacements for the umpires during the regular season.

[12] See Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and* Strikes, 31 CASE W. RES. L. REV. 685, 774 (1981); Gould, *Players and Owners Mix It Up*, 8 CALIFORNIA LAWYER 56 (August 1988). See generally, R. Berry, W. Gould and P. Staudohar, *Labor Relations in Professional Sports* (1986).

[13] NLRB v. Borg Warner, 356 U.S. 342, 351 (1958).

procedures.[14] My agency, the National Labor Relations Board, can do little about the ineffectiveness of our remedies because of limitations which have been established by the Supreme Court or the language of the Act itself. It is difficult for the Board to level the playing field of any relationship within the parameters of existing law.

But there is much that the Board can do within its procedures -- particularly with regard to the use of its authority under Section 10(j) to seek temporary injunctive relief against employer and union unfair labor practices. Since I and President Clinton's other NLRB appointees arrived in Washington, D.C. almost 14 months ago, we have used this provision of the law against both employer and union unfair labor practices with unprecedented frequency -- a total of 132 times. The purpose is to bypass an unduly time consuming and burdensome administrative process where, by virtue of delay, the relief fashioned would be too late to effectively implement the statute's objectives.

In Silverman v. Major League Players Association,[15] the Board voted to authorize the use of temporary injunctive relief to restore the status quo ante in the employment relationship which had been altered by virtue of the owners discontinuance of the free agency and salary arbitration system. On March 26, the Board voted to seek injunctive relief against such conduct and, in my view, therefore concluded that there was reasonable cause to believe that this conduct constituted an unfair labor practice and that relief was just and proper -- principally because the passage of time would make the remedy, when provided, relatively meaningless.

The Board has no authority to oblige the parties to resume or continue the season -- or to fashion an agreement for them. Under our system of voluntary collective bargaining that process is for the parties themselves. The Board's only role is to insure adherence to proper procedures to rid the process of unlawful impediments, and to provide for an appropriate framework for future collective bargaining.

If the administrative process was the only avenue available, restored employment conditions might have been realized in the 1997 season. Meanwhile, the 1995 and 1996 seasons might not have taken place -- or under circumstances in which quickly eroding baseball skills could not be compensated under processes established voluntarily by labor and management.

---

[14] Gould, *Agenda for Reform: the Future of Employment Relationships and the Law*, (MIT Press) 1993.

[15] Silverman v. Major League Baseball Player Relations Committee, ___ F. Supp. ___, 148 LRRM (BNA) 2922 (D. N.Y. Apr. 3, 1995).

Thus, the use of Section 10(j) so as to preserve the status quo ante can be particularly significant in established bargaining relationships -- as well as in the unorganized sector. It was, as Judge Sotomayor said in her opinion, critical to the 1995 baseball season and a back-to-work agreement. The Board's remedy provided the proper legal framework for future bargaining.

My own judgment is that my agency's use of labor law in the '95 baseball strike may be yet another instance of baseball constituting a mirror image of other societal developments. The most dramatic example of that proposition in my lifetime is the advent of Jackie Robinson at first base for the Brooklyn Dodgers in 1947 -- and the hiring of Larry Doby and Dan Bankhead soon thereafter. Robinson, who hit .296 playing at an entirely new position in his rookie year, broke baseball's color barrier before President Truman desegregated the Armed Forces and seven years before the Supreme Court's historic ruling in Brown v. Board of Education declaring segregation in education to be unconstitutional. The example and contribution of these brave men against odds truly incalculable can never be forgotten.

The Board's reliance upon Section 10(j) injunctions reflects a renewed conviction about our National Labor Relations Act and its purposes, and to the rule of law in the workplace itself. Our weekend work on March 26, and the importance of baseball to our country, made our law and its procedures known to millions who may not have heard of the Board or the Act previously. It was the mirror image of injunctions sought throughout industry in this country and, like Robinson's contribution, it could conceivably influence other relationships. My hope is that this will trigger more awareness of the law and promote voluntary compliance with its provisions.

In particular, I want to pay tribute here in New York to Regional Director Dan Silverman and his staff who not only played an extremely competent role in investigating the matters brought before us, but also presented the case to Judge Sotomayor. The Board's prompt intervention is properly seen as the vehicle through which the parties put aside their differences and resumed baseball and began the 1995 season this week. Meanwhile, of course, the Board is adjudicating the baseball case on its full merits in its administrative process.

Of course, the owners and players themselves have not yet negotiated a new collective bargaining agreement. It was their failure to do so which triggered the 1994 strike, the longest dispute in the history of professional sports in this country and anywhere in the world! Under our system, these negotiations are for the parties themselves under their own voluntary autonomous system of collective bargaining.

But, what the Board and, ultimately the judiciary, have done through the use of Section 10(j) is to create a framework in which the collective bargaining process is fostered. This is the kind of objective that our law was designed to accomplish when first enacted by Congress in 1935 in the form of the Wagner Act. Over the years we have sometimes lost our way because of the failure to use the provisions which give our statute strength.

My belief is that our March 26 determination to seek injunctive relief in the 1995 baseball dispute was consistent with the law, has been good for the game of baseball and its '95 season in particular, and, most significant of all, important to the effective administration of our statute.

As is true of all of American society, we need to have the game of baseball be one in which the interests of all parties -- players, owners and fans -- are taken into account. This is consistent with the policies of the National Labor Relations Act which my agency administers. A balanced relationship in which genuine voluntary collective bargaining is encouraged and conflict is diminished is consistent with our national labor policy and with the honor that we appropriately bestow upon Babe Ruth.

This spring of 1995 represents a new season in which a long deep drive was hit for baseball, for effective labor law enforcement, and for so much of what is truly great about our country on this 100th anniversary of the Babe's birth.

# # #